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NO. 57463-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GANTRY MATHEWS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER  
THE HONORABLE SHARON ARMSTRONG

---

**BRIEF OF RESPONDENT**

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**A. CROSS-ASSIGNMENT OF ERROR**

The trial court erred in ruling that Detective O'Keefe had intentionally violated motions in limine during his testimony.<sup>1</sup> RP (11/10/05) 55.

**B. ISSUES PRESENTED**

1. A motion for a mistrial should not be granted unless the defendant has been so prejudiced that nothing short of a new trial will ensure that the defendant will be tried fairly. A trial court's decision to deny a motion for mistrial is reviewed for manifest abuse of discretion. In this case, the trial court denied a motion for mistrial after a detective referenced two topics that were subject to motions in limine during his testimony. The remarks were brief and ambiguous, and the trial court instructed the jury to disregard them. This murder trial involved the testimony of more than a dozen witnesses, and the evidence of the defendant's guilt is substantial. Did the trial court exercise sound discretion in denying the defendant's motion for a mistrial?

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<sup>1</sup> Because the State does not request affirmative relief and seeks only to sustain the judgment of the trial court, it may assign error without filing a notice of cross-appeal. See State v. Kindsvogel, 149 Wn.2d 477, 481, 69 P.3d 870 (2003).

2. Under CrR 4.3.1, related offenses generally should be charged in one information and joined for trial. The failure to join related offenses would normally result in dismissal. However, an exception to this rule exists if the ends of justice would be defeated by application of the rule. The "ends of justice" exception applies in extraordinary circumstances. This court has previously held that such extraordinary circumstances exist in cases affected by the Washington Supreme Court's decision in In re Andress. In this case, the defendant's felony murder conviction was vacated due to Andress. Accordingly, the trial court ruled that the "ends of justice" exception applies, and allowed the State to proceed on a charge of intentional murder. Should this court affirm?

3. Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational jury could have found the crime proved beyond a reasonable doubt. The defendant claims the evidence is insufficient to prove that he intended to kill the victim. The evidence showed that the defendant shot the victim in the back with a .44 Magnum revolver from three to five feet away. The defendant shot the victim through the heart and both lungs, causing death almost immediately. The firearms expert testified that the shooting could not have been the result of

an accident during a struggle as the defendant had claimed. Is the evidence sufficient to support the jury's conclusion that the defendant intended to kill the victim?

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Gantry Mathews, was originally charged with murder in the second degree (felony murder with second-degree assault as the predicate felony) for the November 30, 1994 shooting death of Simeon Villarosa. CP 1-4. A jury convicted him as charged, and he received a standard-range sentence. CP 5-10. This court rejected all of Mathews's claims on appeal in an unpublished opinion. State v. Mathews, 82 Wn. App. 1068 (1996 WL 470669). Years later, Mathews filed a personal restraint petition challenging his conviction under In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), and In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). This court granted relief, vacated the conviction, and remanded the case to the King County Superior Court for further lawful proceedings. CP 23-26.

On remand, the State charged Mathews with murder in the second degree under the intentional murder prong. CP 27.



Mathews moved to dismiss the amended charge on grounds of mandatory joinder, speedy trial, and due process. The State opposed the motion. CP 29-75, 76-88. The Honorable Ronald Kessler rejected Mathews's motion to dismiss on all grounds, and ordered the prosecution to proceed. RP (5/26/05) 20-23.

Mathews was retried in late June and early July 2005 before the Honorable Sharon Armstrong. The jury was unable to reach a verdict and a mistrial was declared. Supp. CP \_\_\_\_ (Sub. No. 181C, p.2). A second retrial was held in November 2005, and Mathews was convicted as charged. CP 186-87. He again received a standard-range sentence. CP 228-37. He now appeals. CP 227.

## **2. SUBSTANTIVE FACTS**

Simeon Villarosa worked as a clerk at a 7/Eleven store in the Rainier Beach neighborhood of Seattle. He worked the graveyard shift with his supervisor, Alisa Binongal. RP (11/9/05) 6-8.

Villarosa was 66 years old, 5'4" tall, and weighed 158 pounds. He wore thick glasses and had mild to moderate heart disease. RP (11/9/05) 19; RP (11/10/05) 109, 119, 130. When Villarosa was working at 7/Eleven, he always carried a security alarm device in the pocket of his uniform smock. RP (11/9/05) 20-21. Villarosa was a non-confrontational man who never attempted to intervene

when there were shoplifters or other incidents in the store. It was also 7/Eleven company policy that employees should not attempt to interfere when such incidents occurred. RP (11/9/05) 8-9.

At approximately 3:30 a.m. on November 30, 1994, Mathews walked into the 7/Eleven with his girlfriend, Andrea Lambert. RP (11/9/05) 11. Mathews, Lambert, and Lambert's best friend, Tysonia Green, had been out for the evening, and they went to 7/Eleven because Mathews said he was hungry. RP (7/6/05) 78-82.<sup>2</sup> While Green waited in the car, Mathews and Lambert walked around the store. Mathews was carrying a loaded .44 Magnum revolver. RP (11/14/05) 90-91, 98.

Mathews and Lambert wandered around the store while Villarosa mopped the floor and Binongal worked at the cash register. RP (11/9/05) 13. Mathews made Binongal very nervous because he and Lambert were in the store for an unusually long time, and because Mathews asked her several times how many employees were working. He also asked her about chili and cheese for the nachos. RP (11/9/05) 11-13.

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<sup>2</sup> Lambert's testimony from the retrial in June/July 2005 was presented to the jury during the second retrial in November because Lambert was unavailable due to medical issues. RP (11/3/05) 14-20; RP (11/8/05) 18.

After a delivery man left the store after dropping off the morning newspapers, Binongal heard Villarosa cry out, "no, no, friend, no," and he told Binongal to call 911. RP (11/9/05) 15. Binongal looked to the back of the store; Mathews had the gun in his hand, and Villarosa grabbed Mathews's wrist and tried to push the gun away. RP (11/9/05) 15, 47-48. Binongal called 911; shortly thereafter, the gun fired. Ex. 7. Binongal put the telephone down and went to the back room to continue her call. As she headed to the back of the store, she saw Mathews and Villarosa on the ground. RP (11/9/05) 16. A second shot went off approximately 18 seconds after the first shot. After the second shot, Binongal did not hear anything else. Ex. 7.

The first shot Mathews fired went through Villarosa's right hand, severely injuring it. RP (11/10/05) 107-08. This shot had been fired at a steep angle upwards while Mathews and Villarosa were on the floor. RP (11/8/05) 58-65. Mathews fired the second shot into Villarosa's back from a distance of three to five feet, muzzle to target, with four feet being the most likely distance. RP (11/14/05) 39. This shot hit Villarosa's lungs, aorta, and heart, and he died quickly. RP (11/10/05) 110-11.

After the shooting, Mathews and Lambert got in Green's car and they drove away. Lambert screamed, "why did you shoot him[?]" Mathews replied, "because I'm a gangster." RP (11/10/05) 146. His face was blank, and he was smirking when he made this remark. RP (11/10/05) 147.

Green drove Mathews and Lambert to Lambert's mother's house. Green went to her boyfriend's house; her boyfriend then drove her to her sister's house, and she called the police from there. The police picked her up, and she gave a statement. RP (11/10/05) 148-50. Meanwhile, Mathews and Lambert took a taxi to Lambert's friend's house, where they stayed until daybreak. RP (11/14/05) 123-24. At some point, Mathews reloaded his .44 Magnum, and ate the food that Lambert had purchased for him at 7/Eleven. Ex. 106; RP (11/14/05) 126.

Later that day, Mathews took a taxi to his friend Ms. Bentley's house. Bentley was moving, so Mathews went with her to her new apartment. RP (11/14/05) 124-25. Mathews called his mother several times from Bentley's apartment. The police were at his mother's house, and they were able to trace the call in order to ascertain Mathews's whereabouts. RP (11/9/05) 93-94; RP

(11/14/05) 183-84. A SWAT team went to Bentley's apartment and arrested Mathews. RP (11/10/05) 4-7.

After he was arrested, Mathews told the police that he had thrown the gun away near Rainier Beach High School. RP (11/10/05) 10-11. However, the police recovered the fully-loaded .44 Magnum revolver, as well as a bag of ammunition and Mathews's bloody clothes, from the closet in Bentley's bedroom. RP (11/9/05) 81, 85, 105. At the police station, Mathews gave a taped statement to detectives and claimed that Villarosa had tried to take the gun out of his pocket and that a struggle had ensued. Mathews claimed that the gun went off during the struggle because Villarosa was pulling on the gun barrel while trying to take it away. Ex. 106. However, the State's firearms expert concluded that the second shot could not have occurred during a struggle for the firearm because of the muzzle-to-target distance and the fact that Villarosa was shot in the back. RP (11/14/05) 67. The .44 Magnum revolver was in good working order, and required 11 pounds of trigger pull to fire. RP (11/14/05) 12-15.

The relevant facts of this case will be discussed in further detail below as necessary for argument.

**D. ARGUMENT**

**1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL.**

Mathews first claims that he must be granted a new trial because the trial court erred in denying his motion for a mistrial. Specifically, Mathews claims that Detective O'Keefe's references to a photograph in a "booking file" and to Andrea Lambert sitting on Mathews's lap at the police station resulted in irreparable prejudice and deprived him of a fair trial. See Brief of Appellant, at 6-14. This claim should be rejected because the trial court exercised sound discretion in ruling that a mistrial was not necessary. Moreover, the trial court's observation that the detective must have intentionally violated the court's rulings in limine is not supported by the record, and thus this court should reject Mathews's due process claims based on that ruling. Finally, even if this court were to conclude that O'Keefe committed intentional misconduct, Mathews still fails to demonstrate prejudice.

A trial court's decision to deny a motion for a mistrial is reviewed for manifest abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A reviewing court will find an abuse of discretion only if no reasonable trial judge could have

decided that a mistrial was not necessary. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A mistrial should be granted "only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly."

State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

Accordingly, the reviewing court gives deference to the trial court's judgment, as the trial judge is clearly in the best position to determine whether irreparable prejudice has occurred. See Lewis, 130 Wn.2d at 707.

When reviewing a trial court's decision to deny a motion for mistrial based on a witness's objectionable remarks, appellate courts generally examine three factors: 1) the seriousness of the irregularity; 2) whether the error involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard the remarks. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Jurors are presumed to follow the trial court's instructions to disregard inadmissible testimony. Johnson, 124 Wn.2d at 77.

Moreover, the testimony in question must be examined "against the backdrop of all the evidence" and in light of the record as a whole.

State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). A trial court's decision to deny a motion for mistrial should not be

overturned on appeal unless the record demonstrates that the irregularity prejudiced the defendant such that it affected the outcome of the trial. See Mak, 105 Wn.2d at 701.

A witness's inadmissible testimony referencing the defendant's criminal history does not warrant a new trial if the remarks are relatively insignificant in the context of the entire trial. See Hopson, 113 Wn.2d at 284-86 (holding that a witness's remark that the victim met the defendant before "he went to the penitentiary the last time" was not prejudicial in light of the whole record and substantial evidence of guilt). On the other hand, a new trial may be necessary if the impermissible remark references specific, prejudicial prior misconduct, particularly if the State's admissible evidence is weak. See Escalona, 49 Wn. App. at 254-56 (holding that the victim's testimony that the defendant "already has a record and had stabbed someone" warranted granting a mistrial where the other evidence was weak and the charge was assault with a knife). In short, each case must be decided on its own facts, giving appropriate deference to the judgment of the trial court. Id. at 256. Based on these standards, Mathews's claim is without merit.

Detective O'Keefe's first objectionable remark occurred during cross-examination, when defense counsel asked a question



that put Mathews's prior booking information at issue in the context of the detective's investigation of the case:

Q: You learned Gantry Matthews' (sic) name or full name at about 1:00 that afternoon, is that right?

A: Correct, we took the information from Tysonia Green, we interviewed her about quarter of 11 after we reviewed the videotape. We interviewed Tysonia Green, she gave us the name of Gantry Matthews (sic). The detective started working on the name from the picture on King County booking file.

MS. CURTIS: Objection, move to strike.

THE COURT: Nonresponsive, stricken.

The jury will disregard it.

BY MS. CURTIS:

Q: You learned his full name at 1:00 courtesy of -- strike that.

You used the still [photograph] with Tysonia Green, is that right?

A: That's correct.

RP (11/10/05) 31. The second objectionable remark occurred during redirect, at a point where the State was attempting to clarify the sequence of events:

Q: Detective, I want to ask you about the last subject Miss Curtis was asking you about. At this point I'm confused on the chronology when you were talking to the defendant.

At what point in time was his contact with Miss Lambert that took place in your presence and lasts about five minutes in terms of the sequence of events?

A: Well, she was being fingerprinted and brought to the room. We brought her inside, Detective Lima and I were in the same room and she sat down on his lap. They talked.

MS. CURTIS: Objection, move to strike.

THE COURT: The way in which she sat down is irrelevant, stricken, and the jury will disregard it.

RP (11/10/05) 47.

First, the detective's reference to a photograph in a "booking file" was not prejudicial in light of the record. Initially, it should be noted that although Mathews's multiple prior arrests for multiple prior shootings had been suppressed for Mathews's benefit,<sup>3</sup> Detective O'Keefe's passing reference to a photo in a "booking file" occurred when defense counsel asked a question putting Mathews's prior arrests at issue, as it was from prior bookings that the detectives were able to gather relevant information about Mathews. Second, although O'Keefe's passing reference to a photo in a "booking file" was not technically cumulative of other evidence, references to other photographs and to the fact that

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<sup>3</sup> See Supp. CP \_\_\_\_ (Sub. No. 181C, p.9).

Mathews was booked in this case occurred at other points in the record, thus minimizing any possible prejudice. RP (11/9/05) 116; RP (11/10/05) 28-28. Moreover, this remark was ambiguous, isolated, and took place in the context of a trial that encompassed five days of testimony from more than a dozen witnesses and the admission of more than 100 exhibits. Unlike the remark in Escalona, O'Keefe's remark did not reference specific, prejudicial misconduct; in fact, O'Keefe did not reference any prior misconduct at all. Furthermore, the trial court sustained defense counsel's objection in a manner that did not draw undue attention to the remark, struck the remark from the record, and instructed the jury to disregard it. Defense counsel then moved on to another topic, which also referenced a photograph. RP (11/10/05) 31.

O'Keefe's passing reference to Lambert sitting on Mathews's lap at the police station is even less of a concern. First, although a photograph of Lambert sitting on Mathews's lap at the police station was suppressed at the defense's request, the photograph itself was not introduced during the trial in accord with the trial court's ruling. RP (6/28/05) 43. Moreover, the State's question preceding O'Keefe's remark was convoluted, resulting in confusion for the witness. RP (11/15/05) 35. At the point where this remark was

made, the jury had already heard that Lambert and Mathews were allowed contact with one another in the detectives' presence at the police station, and the jury had already heard that Lambert and Mathews were dating. RP (7/6/05) 77; RP (11/10/05) 20, 40-41. Accordingly, the fact that Lambert showed affection for Mathews is neither surprising nor prejudicial. Moreover, as with the prior remark, the trial court sustained counsel's objection and instructed the jury to disregard it. RP (11/10/05) 47. No further objectionable remarks were made.

In light of the entire record, the trial court exercised sound discretion in denying Mathews's motion for a mistrial. As will be discussed in the third argument section below, the evidence of Mathews's guilt is substantial. The detective's remarks were isolated, and the reference to a "booking file" is ambiguous to the point that it is highly unlikely that the jurors would have thought that the detective was referring to prior arrests at all, let alone prior arrests for prior shootings. Lastly, the trial court instructed the jury to disregard the remarks, and the jury is presumed to follow the court's instructions. The trial court did not abuse its discretion in ruling that the extraordinary remedy of a mistrial was not warranted, and this court should affirm.

Nonetheless, Mathews argues that a different standard of review should apply here because Detective O'Keefe committed misconduct by intentionally violating the rulings in limine. This court should reject this claim for two reasons. First, the record does not support the trial court's ruling that O'Keefe's objectionable remarks were intentional. Second, even if this court were to view the remarks as intentional, there is still no prejudice warranting reversal.

In some cases, when a witness commits intentional misconduct by throwing "an evidential harpoon" concerning the defendant's inadmissible prior criminal history, the defendant is denied his right to a fair trial and a new trial is necessary. State v. Taylor, 60 Wn.2d 32, 37, 371 P.2d 617 (1962). However, in reviewing the trial court's decision as to whether intentional witness misconduct justifies a new trial, appellate courts still recognize that the trial judge is in the best position to gauge whether irreparable prejudice has occurred, and thus "an appellate court will not substitute its judgment for that of the trial court." Id. at 40. Accordingly, even in the context of intentional misconduct by a witness, the appellate court affords the trial court "very wide

discretion" to decide whether a new trial is necessary. Id. at 42.

The facts of Taylor are instructive here.

In Taylor, a police sergeant testified that he had "contacted [the defendant's] parole officer" in response to a question about the defendant's interrogation. Taylor, 60 Wn.2d at 33. The defense moved for a mistrial, noting that "nobody has a parole officer unless they have been convicted of a crime," but the trial court denied the motion. Id. After this exchange between defense counsel and the judge, the sergeant reiterated that he had "contacted the parole officer of the defendant, Taylor[.]" Id. The trial court ultimately granted a new trial, and the Washington Supreme Court affirmed, holding that the trial court had exercised sound discretion in finding that the defendant had been irreparably prejudiced and that a curative instruction would have made the situation worse. In so doing, the Supreme Court observed that the sergeant's remarks were intentional violations, particularly because "the witness reiterated the comment about the defendant's parole officer as soon as the motion was overruled." Id. at 36.

Nothing approaching what occurred in Taylor occurred in this case. As noted above, Detective O'Keefe's remarks were isolated, ambiguous, and not repeated. As further noted, O'Keefe's

ambiguous reference to a "booking file" was made in response to a question that touched upon Mathews's prior bookings. Yet unlike the sergeant in Taylor, O'Keefe did not offer any specific information regarding prior arrests. Had O'Keefe intended to throw an "evidential harpoon," he certainly could have been more specific. Moreover, O'Keefe's brief reference to Lambert sitting on Mathews's lap was made in response to an inartful question by the State. Furthermore, when counsel for the State spoke with O'Keefe after his testimony, O'Keefe stated that he did not intentionally violate the court's rulings, and was simply confused by the questions asked. RP (11/15/05) 35. This record does not support the conclusion that Detective O'Keefe committed intentional misconduct, and Mathews's claim to the contrary should be rejected.

But even if this court were to conclude that Detective O'Keefe's remarks were intentional, this court should still affirm. As Taylor makes clear, even a witness's intentional misconduct should not result in a new trial unless the record demonstrates that the defendant's right to a fair trial has been prejudiced. Accordingly, the trial court's decision to grant or to deny a new trial in such circumstances is still afforded substantial deference on appeal and

is reviewed only for manifest abuse of discretion. See Taylor, 60 Wn.2d at 41-42. Thus, even considering Mathews's claim on appeal in the context of intentional witness misconduct, there is still no basis to reverse the trial court's determination that a new trial was not warranted because substantial prejudice has not been shown. Mathews's conviction should be affirmed.

**2. THE TRIAL COURT CORRECTLY APPLIED THE "ENDS OF JUSTICE" EXCEPTION TO THE MANDATORY JOINDER RULE, AND CORRECTLY RULED THAT THE TIME FOR TRIAL RULE WAS NOT VIOLATED.**

Mathews next argues that the trial court erred in ruling that neither the mandatory joinder rule nor the time for trial rule were violated in this case, and in concluding that the State could proceed to trial on a charge of second-degree intentional murder. Thus, he argues that his conviction must be reversed and dismissed. See Brief of Appellant, at 14-22. But the trial court's rulings were sound and in accordance with controlling precedent. Therefore, Mathews's claims should be rejected.

**a. Mandatory joinder**

The joinder of related offenses is governed by CrR 4.3.1. In general, the rule provides that all offenses based on the same conduct should be joined for trial. CrR 4.3.1(b)(2). In addition, the



rule provides that a defendant who has already proceeded to trial on one offense may thereafter move to dismiss any subsequent charge for a related offense, and that such a motion should be granted in the absence extraordinary circumstances:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or *for some other reason, the ends of justice would be defeated if the motion were granted.*

CrR 4.3.1(b)(3) (emphasis supplied). This rule is not of constitutional magnitude, and is not based on double jeopardy; rather, the rule is grounded in principles of issue preclusion. State v. Dallas, 126 Wn.2d 324, 329-30, 892 P.2d 1082 (1995).

Under normal circumstances, when a conviction under one statutory alternative is reversed on appeal, the State is precluded under CrR 4.3.1 from prosecuting the defendant on remand under a different statute that is not a lesser-included offense. State v. Anderson, 96 Wn.2d 739, 740-42, 638 P.2d 1205 (1982). However, the "ends of justice" exception to the requirement of

mandatory joinder under CrR 4.3.1(b)(3) may be applied in "extraordinary circumstances" in which the State, through no fault of its own, would be unjustly precluded from retrying the defendant or unfairly hampered in its ability to prosecute the defendant following an appeal. State v. Carter, 56 Wn. App. 217, 223, 783 P.2d 589 (1989). The "ends of justice" exception does not apply if "the prosecutor intends to harass [the defendant] or is simply negligent in charging the wrong crime." Dallas, 126 Wn.2d at 332-33. Rather, the extraordinary circumstances must arise from factors that are extraneous to the action or that have affected the regularity of the court proceedings. Id. at 333.

This court has already ruled that such extraordinary circumstances exist in cases affected by the Andress decision. State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004). In Ramos, this court ruled that the Washington Supreme Court's rejection of felony murder based on assault in Andress was a "highly unusual" event wholly outside the State's control, given the "unbroken line of precedent" upholding felony murder based on assault prior to Andress. Ramos, 124 Wn. App. at 342. Accordingly, this court remanded the defendants' case to the trial court to determine whether any other factors would preclude the

application of the "ends of justice" exception to CrR 4.3.1. Id. at 343.

Ramos is directly on point in this case. As in Ramos, Mathews was originally charged with and convicted of second-degree felony murder predicated on assault. CP 5-10. This court then rejected all of Mathews's original appellate claims, including a challenge to the felony murder rule. State v. Mathews, 82 Wn. App. 1068 (1996 WL 470669). Years later, Mathews's conviction was vacated due to the Andress and Hinton decisions. CP 23-26. These circumstances were extraneous to the action, affected the regularity of the proceedings, and were wholly outside the State's control. Therefore, the trial court ruled that the ends of justice would be defeated if the State were precluded from prosecuting Mathews for intentional murder on remand, and thus the mandatory joinder rule should not apply. RP (5/26/05) 20-23. This ruling was proper, and it should be affirmed.

Nonetheless, Mathews criticizes the Ramos decision, and argues that this court erred in concluding that Andress constituted extraordinary circumstances because, according to Mathews, Andress was not really a departure from precedent. See Brief of Appellant, at 20. This claim belies the existence of precedent

recognizing the validity of felony murder based on assault dating back at least 30 years. See, e.g., State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966); State v. Thompson, 88 Wn.2d 13, 558 P.2d 202 (1977); State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978); State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991); State v. Davis, 121 Wn.2d 1, 846 P.2d 527 (1993); State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998). Mathews's claim also belies numerous decisions from this court rejecting challenges to the felony murder rule. See, e.g., State v. Safford, 24 Wn. App. 783, 787-90, 604 P.2d 980 (1979), rev. denied, 93 Wn.2d 1026 (1980); State v. Theroff, 25 Wn. App. 590, 593-95, 608 P.2d 1254, rev'd in part on other grounds, 95 Wn.2d 385, 622 P.2d 1240 (1980); State v. Heggins, 55 Wn. App. 591, 601, 779 P.2d 285 (1989); State v. Creekmore, 55 Wn. App. 852, 858-59, 783 P.2d 1068 (1989), rev. denied, 114 Wn.2d 1020 (1990); State v. Goodrich, 72 Wn. App. 71, 77-79, 863 P.2d 599 (1993), rev. denied, 123 Wn.2d 1029 (1994); State v. Bartlett, 74 Wn. App. 580, 588, 875 P.2d 651 (1994), aff'd, 128 Wn.2d 383, 907 P.2d 1196 (1995); State v. Duke, 77 Wn. App. 532, 534, 892 P.2d 120 (1995).

Mathews further claims that this court's analysis of the "ends of justice" exception to CrR 4.3.1 is "dicta" that need not be

followed. Brief of Appellant, at 19. However, this argument not only runs contrary to this court's statement of the sole issue presented in Ramos, but it also runs contrary to the argument made by the defendants in Ramos:

The only issue before us is whether the State may institute further proceedings on remand. Double jeopardy prohibits retrial on the original charges. The State seeks to file new charges of manslaughter. *Ramos and Medina contend new charges are barred by the mandatory joinder rule.*

Ramos, 124 Wn. App. at 338 (emphasis supplied).

The trial court ruled correctly and in accordance with precedent that the ends of justice would be defeated by application of the mandatory joinder rule, and therefore the State could proceed on a charge of second-degree intentional murder. This court should affirm.

b. Speedy trial

Mathews's claim based on the time for trial rule should also be rejected.

Mathews correctly notes that the rule generally requires that the trial of an in-custody defendant commence within 60 days of arraignment. CrR 3.3(b)(1) and (c)(1). However, Mathews mistakenly claims that "CrR 3.3 does not address the situation in

which multiple charges arise from the same criminal conduct or criminal episode." Brief of Appellant, at 21. To the contrary, the time for trial rule expressly provides that "[t]he computation of the allowable time for trial of a pending charge shall apply equally to all related charges." CrR 3.3(a)(5). Moreover, the rule also expressly provides that the time for trial calculation begins anew when an appellate court issues a mandate or an order terminating collateral review. CrR 3.3(c)(2)(iv) and (v). In such cases, the defendant's first appearance in court upon remand becomes the new "commencement date" for purposes of the rule. Id. Thus, in accordance with the rule and with this court's precedent, "the time for trial on the renewed prosecution for intentional murder charge began to run at the time of the order dismissing [the defendant's] conviction for the related offense of felony murder." State v. Wright, 131 Wn. App. 474, 488, 127 P.3d 742 (2006).

Furthermore, the rule unambiguously provides that a charge "shall not be dismissed due to any delay attributable to "circumstances not addressed in this rule" unless the defendant's constitutional speedy trial rights have been violated. CrR 3.3(a)(4). The constitutional right to a speedy trial is violated only when an unreasonable delay has occurred, taking into account the following

four factors: 1) the length of the delay, 2) the reason for the delay, 3) whether and when the defendant asserted the right to a speedy trial, and 4) whether the defendant has been prejudiced. State v. Higley, 78 Wn. App. 172, 185, 902 P.2d 659, rev. denied, 128 Wn.2d 1003 (1995).

In this case, Mathews's conviction was vacated – at his request – as a result of Andress and Hinton. The fact that Andress was decided in 2002 and Hinton was decided in 2004 is wholly beyond the State's control. The extraordinary reasons for the delay in this case, coupled with a lack of prejudice to the defendant, are sufficient to defeat any constitutional speedy trial claims. Indeed, Mathews does not claim that a constitutional speedy trial violation occurred. Furthermore, the plain language of CrR 3.3, which provides for the re-commencement of the time for trial calculation following remand from an appellate court, whether for the original charge or a related charge, defeats Mathews's rule-based speedy trial claim.

**3. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S CONCLUSION THAT THE DEFENDANT INTENDED TO KILL THE VICTIM.**

Finally, Mathews argues that the evidence presented at trial is insufficient to sustain his conviction for murder in the second

degree. More specifically, Mathews argues that the evidence fails to prove that he intended to kill Simeon Villarosa. See Brief of Appellant, at 22-25. This argument is without merit, as substantial evidence supports the jury's verdict.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational jury could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all rational inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Furthermore, the reviewing court defers to the jury's determination as to the weight and credibility of the evidence and its resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75.

Circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). To the contrary, a defendant's criminal intent



"may be inferred from circumstantial evidence, or from conduct, where the intent is plainly indicated as a matter of logical probability." State v. Billups, 62 Wn. App. 122, 126, 813 P.2d 149 (1991) (citations omitted). Based on these standards, Mathews's claim that the evidence failed to prove his intent to kill the victim should be rejected.

In this case, the evidence proved that Mathews walked into 7/Eleven armed with a loaded .44 Magnum revolver. RP (11/14/05) 84, 89. This large, high-caliber handgun required 11 pounds of trigger pressure to fire, was functioning normally, and could not be discharged accidentally as the result of a malfunction. RP (11/14/05) 12-15.

Just prior to the shooting, Simeon Villarosa cried out, "no, friend, no," and told Alisa Binongal to call 911. RP (11/9/05) 15. Villarosa initially grabbed Mathews's wrist while the gun was in Mathews's hand in an effort to try to push the gun away from him. RP (11/9/05) 47-48. Mathews shot Villarosa twice: once in the right hand, and once in the back. RP (11/10/05) 107, 109. The shot to Villarosa's hand fractured the metacarpal bone and tore through muscles and tendons, causing functional impairment. RP (11/10/05) 108. The shot to Villarosa's back injured the left lung,

heart, aorta, and right lung, causing death in a very short time. RP (11/10/05) 110-11. Approximately 18 seconds elapsed between the first shot and the second, fatal shot. Ex. 7.

Although the first shot was fired while Mathews and Villarosa were struggling on the floor, the State's firearms expert concluded that it was not possible for Villarosa to get shot in the back if there had been a continuing "frontal tug of war" for the gun as Mathews had claimed at the time of the second, fatal shot. RP (11/14/05) 67. The physical evidence supported the expert's conclusion, as Villarosa died a considerable distance away from where the struggle had occurred. Ex. 65. Passive blood drops surrounding Villarosa's body were largely undisturbed, further disproving Mathews's claim that the fatal shot occurred during a struggle. RP (11/9/05) 63.

Mathews's intent to kill is also apparent from the fact that he shot Villarosa in the back from three to five feet away, with four feet being the most likely distance from muzzle to target. RP (11/14/05) 39. This fact alone disproved Mathews's version of what had occurred, and showed that Mathews intentionally shot Villarosa in the back from a distance where Villarosa's hands could not have been on or near the gun when it was fired as Mathews had claimed.

Additionally, after the shooting, when Andrea Lambert screamed, "why did you shoot him[?]" Mathews replied, "because I'm a gangster." RP (11/10/05) 146. This statement is, to say the least, probative evidence of Mathews's intent.

In sum, the evidence proved that Mathews carried a fully-loaded, high-caliber handgun into a store and shot a 66-year-old, seriously injured, unarmed man in the back as he tried to run away after his initial attempts to defend himself proved futile, and that every major organ in the victim's chest was mortally damaged as a result. Accordingly, the defendant's intent to kill the victim "is plainly indicated as a matter of logical probability" by the defendant's conduct as proved at trial. Furthermore, although Mathews claimed that he did not shoot Villarosa intentionally, the jurors clearly rejected this claim, as is their prerogative as triers of fact and sole judges of credibility. Viewing all of the evidence in the light most favorable to the State, substantial evidence supports the jury's conclusion that Mathews intended to kill Simeon Villarosa. This court should reject Mathews's claim to the contrary, and affirm.

**E. CONCLUSION**

The trial court exercised sound discretion in denying the defendant's motion for a mistrial. The defendant's claim that the court rules governing mandatory joinder and speedy trial were violated should be rejected. Substantial evidence supports the essential elements of second-degree intentional murder. For all of the foregoing reasons, this court should affirm the defendant's conviction and sentence for murder in the second degree.

DATED this 12<sup>th</sup> day of December, 2006.

RESPECTFULLY submitted,

NORM MALENG  
King County Prosecuting Attorney

By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M.Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. GANTRY MATHEWS, Cause No. 57463-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

12/12/06

Date